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**IN THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA**

XINGFEI LUO,

Petitioner,

V.

THE STATE OF CALIFORNIA.

Respondent.

Case No. 8:22-cv-01640-MEMF-KES

**SUPPLEMENTAL RESPONSE TO
AMENDED PETITION FOR WRIT
OF HABEAS CORPUS**

Judge: The Honorable Karen E. Scott

Action Filed: 9/06/2022

**SUPPLEMENTAL RESPONSE ADDRESSING PETITIONER'S CLAIM
THIRTY-FIVE**

INTRODUCTION

As noted in Respondent’s Memorandum, after breaking up with Tomas C., Petitioner Xingfei Luo engaged in a campaign of revenge porn, violated court orders to cease, and ended up convicted of vandalism, violation of a protective order, and unlawful dissemination of private photos and recordings. Following briefing by both parties on Luo’s amended federal habeas corpus Petition, this Court requested clarification on the legal basis of Luo’s thirty-fifth claim for relief—which concerned an alleged instructional error about the prosecution’s

1 theory of the manner in which she violated her court order. Luo clarified that, in
2 addition to her due process argument, this claim also seeks relief on the basis of
3 ineffective assistance by both her trial and appellate counsel. Based on this
4 clarification, the Court invited supplemental briefing from Respondent on this
5 claim.

6 In addition to being procedurally defaulted, Luo's argument does not warrant
7 relief, whether evaluated as a due process or ineffective assistance claim. The
8 instructions provided by the court informed the jury of the essential elements of the
9 offense, and did not lessen the prosecution's burden of proof to Luo's detriment.
10 The instructions did not violate Luo's federal due process guarantee and altering
11 them could not have resulted in a more favorable trial outcome for her. For the
12 same reasons, her attorneys did not perform deficiently in declining to raise the
13 argument she now seeks to advance. Likewise, Luo's cannot meet her burden to
14 show that her complaints about the performance of counsel prejudiced the outcome
15 of her trial.

16 Like all her other claims, the thirty-fifth claim of Luo's amended Petition
17 should be denied and dismissed with prejudice.

18 ARGUMENT

19 I. LUO'S CLAIM THAT THE TRIAL COURT GAVE AN INAPPLICABLE JURY 20 INSTRUCTION REGARDING HER RESTRAINING ORDERS (CLAIM 35) DOES NOT WARRANT FEDERAL HABEAS RELIEF

22 Luo alleges that the trial court provided a jury instruction that was unrelated to
23 the manner in which she was charged with violating her restraining orders. (ECF
24 Doc. 33 at 103.) Specifically, she faults the court for providing an instruction that
25 tracked the language of the prosecution's initial complaint (violating order not to
26 contact or disturb the victim) rather than the theory the prosecutor ultimately used
27 under the amended information (Luo's violation of the court order to remove the
28 victim's private photographs she posted online). (ECF Doc. 33 at 103; ECF Doc. 3

1 at 159, 172-173 [CT 146, 159-160].) Luo subsequently clarified that the federal
 2 basis for these claims is twofold. First, she alleges that the complained-of
 3 instruction violated her constitutional right to due process. (ECF Doc. 60 at 1-2.)
 4 Second, she argues that her trial counsel rendered constitutionally ineffective
 5 assistance in failing to object to, or otherwise seek to correct, the given instruction
 6 and her state appellate counsel failed to raise the error on appeal. (ECF Doc. 60 at
 7 3.)

8 Neither argument entitles her to relief. At the outset, the claim is, as noted in
 9 Respondent's Memorandum, procedurally defaulted. But even on the merits, it
 10 fails. The instructions did not violate federal law, did not lower the prosecution's
 11 burden of proof, and did not otherwise disadvantage Luo or mislead the jury
 12 regarding the essential elements of the charged offense. Furthermore, any supposed
 13 instructional deficiency under state law would not raise a federal question
 14 cognizable here, and could not have affected the outcome or resulted in a more
 15 favorable verdict for Luo. Consequently, Luo cannot show deficient performance
 16 by either her trial or appellate counsel in failing to raise this issue, and regardless,
 17 any shortcomings in their representation were not prejudicial. Viewed under either
 18 standard, the California Supreme Court did not err in summarily denying this claim
 19 (Lodgment 7) because it does not warrant habeas relief.

20 **A. Luo's claim is procedurally defaulted**

21 Federal courts "will not review a question of federal law decided by a state
 22 court if the decision of that court rests on a state law ground that is independent of
 23 the federal question and adequate to support the judgment." *Coleman v. Thompson*,
 24 501 U.S. 722, 729 (1991). The independent and adequate state ground doctrine
 25 "applies to bar federal habeas when a state court declined to address a prisoner's
 26 federal claims because the prisoner had failed to meet a state procedural
 27 requirement." *Id.* at 729-730. Consequently, "[i]n all cases in which a state
 28

1 prisoner has defaulted his federal claims in state court pursuant to an independent
 2 and adequate state procedural rule, federal habeas review of the claims is barred
 3 unless the prisoner can demonstrate cause for the default and actual prejudice as a
 4 result of the alleged violation of federal law, or demonstrate that failure to consider
 5 the claims will result in a fundamental miscarriage of justice.” *Id* at 750.

6 As previously explained in Respondent’s original Memorandum, Luo failed
 7 to raise the instructional error claim she now asserts through her initial state habeas
 8 petition, instead opting to assert it through successive and piecemeal habeas
 9 petitions. (Lodgment 2 at 4-5.) Accordingly, this claim is procedurally barred
 10 under the independent and adequate “*Clark*” rule. *See In re Clark*, 5 Cal. 4th 750,
 11 767-768 (Cal. 1993) (“the court will not consider repeated applications for habeas
 12 corpus presenting claims previously rejected. The court has also refused to consider
 13 newly presented grounds for relief which were known to the petitioner at the time
 14 of a prior collateral attack on the judgment.”); *In re Morgan*, 50 Cal. 4th 932, 945
 15 (Cal. 2010) (“A corollary of the rule against successive petitions is the rule that all
 16 known claims must be brought in a single, timely habeas corpus petition.”).

17 As further detailed below, Luo has provided no satisfactory justification to
 18 excuse her default because she cannot show that she received ineffective assistance
 19 from appellate counsel based on her attorney’s failure to raise the claim on direct
 20 appeal. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (To establish “cause” a
 21 petitioner must “show that some objective factor external to the defense impeded
 22 counsel’s efforts to comply with the State’s procedural rule.”) Nor can she show
 23 prejudice because her argument is meritless, both as a due process and an
 24 ineffective assistance of counsel claim. *Coleman*, 501 U.S. at 750.

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1 **B. Luo's due process claim is meritless**

2 As previously explained in Respondent's original Memorandum, Luo's claim
 3 of instructional error does not warrant habeas relief on the basis of an alleged
 4 violation of her federal due process rights.

5 The constitution prohibits governmental deprivation of life, liberty or
 6 property without due process of law. U.S. Const. amends. V, XIV. This protection
 7 has been applied in the context of alleged instructional error. *See, e.g., Estelle v.*
 8 *McGuire*, 502 U.S. 62, 71-73 (1991); *Boyde v. California*, 494 U.S. 370, 380,
 9 (1990). However, “[e]ven if there is some ‘ambiguity, inconsistency, or deficiency’
 10 in the instruction, such an error does not necessarily constitute a due process
 11 violation.” *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009); *Donnelly v.*
 12 *DeChristoforo*, 416 U.S. 637, 643 (1974) (“[I]t must be established not merely that
 13 the instruction is undesirable, erroneous, or even ‘universally condemned,’ but that
 14 it violated some [constitutional right]”) Thus, “the fact that the instruction was
 15 allegedly incorrect under state law is not a basis for habeas relief.” (*Estelle*, 502
 16 U.S. at 71-72; *Gilmore v. Taylor*, 508 U.S. 333, 343-344 (1993). Rather, the
 17 defendant must show that “there was ‘a reasonable likelihood’ that the jury applied
 18 the instruction in a way that relieved the State of its burden of proving every
 19 element of the crime beyond a reasonable doubt.” *Waddington*, 555 U.S. at 191
 20 (*citing Estelle*, 502 U.S. at 72.). In making this determination, the pertinent
 21 question is “‘whether the ailing instruction by itself so infected the entire trial that
 22 the resulting conviction violates due process,’ ” *Id.*

23 In this case, the prosecutor and defense counsel both informed the jury—
 24 consistent with the amended information—that Luo was alleged to have violated
 25 the temporary restraining order and domestic violence restraining order by violating
 26 the injunction to deactivate websites containing private photographs of the victim
 27 and refrain from further posting such images online. (ECF Doc. 3 at 79 [CT 66];
 28 ECF Doc. 4 at 23-25, 171-173, 175, 178-179 [RT 122-124, 270-272, 274, 277-

1 278].) In addition, the parties stipulated, in relevant part, that the lawful temporary
 2 and permanent restraining orders included the following terms: “Ms. Luo is to stop
 3 posting online content about [the victim] and his company Gorgeous Painting;”
 4 “Ms. Luo is to remove content on the Internet relating to video, pictures, blogs, or
 5 websites about [the victim] created by Ms. Luo;” “Ms. Luo is to stop posting the
 6 picture or likeness of [the victim], or refer to him by name on any social media
 7 website or blog;” and “ Ms. Luo is to remove any pictures or references of [the
 8 victim] from any social media website or blog that she posted.” (ECF Doc. 4 at
 9 119-120 [RT 218-219].) As such, there is no reasonable probability that the jurors
 10 misunderstood their duties or the nature of their inquiry to Luo’s detriment.

11 Furthermore, even if Luo could have demonstrated that the jury instructions
 12 were somehow deficient, she cannot show a violation of federal law. As noted, an
 13 erroneous instruction in a criminal trial violates due process only where it fails to
 14 give effect to the requirement that the State must prove every element of a charged
 15 offense. *Estelle*, 502 U.S. at 71-72. Here, the trial court’s instruction to the jury
 16 included all essential elements of California Penal Code section 273.6(a), and
 17 specifically advised the jurors that the People must prove that Luo willfully violated
 18 the court’s written protective order, lawfully issued under the Domestic Violence
 19 Prevention Act. (ECF Doc. 3 at 159, 172-173 [CT 146, 159-160]); *see also* Cal.
 20 Penal Code § 273.6; Judicial Council of California Criminal Jury Instruction 2701.
 21 Therefore, any error in the instructions did not alleviate the prosecution’s burden of
 22 proof, and thus did not implicate federal due process guarantees.

23 Finally, even if the complained-of instructions failed to inform the jury
 24 regarding an essential element of a criminal offense, no prejudice occurred. When
 25 jury instructions have omitted an essential element of an offense, the error does not
 26 require reversal (even under the more onerous direct appeal standard) where “the
 27 omitted element was uncontested and supported by overwhelming evidence.”
 28 *Neder v. U.S.* 527 U.S. 1, 17 (1999). Here, the parties stipulated that the state court

1) issued lawful orders requiring Luo to refrain from further posting images of the
 2 victim online and to remove those she had already posted, and 2) informed Luo of
 3 her obligations. (ECF Doc. 4 at 118-120 [RT 217-219].) The evidence
 4 conclusively established that Luo failed to comply with these orders, as nude
 5 photos and videos of the victim posted by Luo remained on multiple websites even
 6 up to the time of trial. (ECF Doc. 4 at 80-92 [RT 179-191].) All told, the evidence
 7 supporting this element was uncontested and overwhelming. Therefore, even if
 8 there was an instructional error that somehow rose to a constitutional deprivation,
 9 Luo has failed to sustain her burden to demonstrate a substantial and injurious
 10 effect or influence in determining the jury's verdict. *Brecht*, 507 U.S. at 637. Luo
 11 is not entitled to relief or further evidentiary development. *Pinholster*, 563 U.S. at
 12 181.

C. Luo's ineffective assistance of counsel claims are equally meritless

Luo's claim fares no better when viewed through the lens of ineffective assistance. In order to establish that counsel was ineffective, Luo bears the burden of showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). In considering the first prong of the test, the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. As to the second prong, a "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Under § 2254(d), "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. . . . A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, 562 U.S. 86,

1 101 (2011). Thus, a federal habeas court must use “a ‘doubly deferential’ standard
 2 of review that gives both the state court and the defense attorney the benefit of the
 3 doubt.” *Burt v. Titlow*, 571 U.S. 12, 15 (2013; see *Dunn v. Reeves*, 141 S. Ct. 2405,
 4 2411 (2021) (per curiam) (federal court may grant relief only if “every ‘fairminded
 5 juris[t]’ would agree that every reasonable lawyer would have made a different
 6 decision”) (emphasis in original).

7 Luo cannot satisfy either prong of *Strickland*. She alleged that her trial
 8 counsel abrogated their duties of competent representation by failing to object to or
 9 attempt to correct the complained-of instructional error. (ECF Doc. 60 at 3.) Here,
 10 however, it is crucial to remember that the prosecution’s strongest case that Luo
 11 violated her court order was based on evidence that she refused to remove the
 12 victim’s private photographs she posted online, rather than that she continued to
 13 contact or disturb the victim after the court order. (ECF Doc. 4 at 23-25, 80-92,
 14 171-173, 175, 178-179 [RT 122-124, 179-191, 270-272, 274, 277-278].)
 15 Consequently, any inaccuracy or incompleteness in the court’s given instruction
 16 was actually favorable to the defense, as it did not provide specific details on the
 17 prosecution’s strongest theory of her guilt. (ECF Doc. 3 at 79, 159 [CT 66, 146];
 18 ECF Doc. 33 at 103.)

19 Counsel’s decision whether or not to object is inherently a tactical choice,
 20 entitled to a high degree of deference by the reviewing court. *United States v.*
 21 *Molina*, 934 F.2d 1440, 1448 (9th Cir. 1991); *Larimer v. Yates*, 483 F. App’x 317,
 22 319–20 (9th Cir. 2012); *accord Lundgren v. Mitchell*, 440 F.3d 754, 774 (6th Cir.
 23 2006) (usually, “defense counsel must so consistently fail to use objections, despite
 24 numerous and clear reasons for doing so, that counsel’s failure cannot reasonably
 25 have been said to have been part of a trial strategy or tactical choice.”) Understood
 26 in context, Luo’s trial counsel may have reasonably determined that foregoing an
 27 objection to the offered instructions provided her with a greater chance of obtaining
 28 an acquittal—to which double jeopardy protections would have attached regardless

1 of any instructional error. *See United States v. Martin Linen Supply Co.*, 430 U.S.
 2 564, 571 (1977) (“Perhaps the most fundamental rule in the history of double
 3 jeopardy jurisprudence has been that ‘[a] verdict of acquittal . . . could not be
 4 reviewed, on error or otherwise’ ”). Alternatively, counsel may have simply
 5 determined that, because the offered instruction provided a correct statement of
 6 substantive law regarding the elements of the offense, no further clarification was
 7 required. *See Bashor v. Risley* (9th Cir. 1984) 730 F.2d 1228, 1241 (counsel’s
 8 decision not to object to jury instruction, even if incorrect in hindsight, does not rise
 9 to ineffective assistance where counsel acted out of tactics rather than ignorance).
 10 In any event, it cannot be said that counsel’s conduct was objectively unreasonable
 11 beyond fair-minded disagreement or that such actions had no conceivable strategic
 12 purpose. *See Strickland*, 466 U.S. at 687-689; *Dunn*, 141 S. Ct. at 2411.

13 Luo has also failed to show that her trial counsel’s representation prejudiced
 14 her. *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) (“An ineffective assistance of
 15 counsel claim based on counsel’s failure to object to a jury instruction requires a
 16 showing of prejudice”). As explained above, the evidence proving that Luo
 17 violated a valid court order to remove nude photographs of the victim from the
 18 internet was uncontested and overwhelming, meaning that any instructional error
 19 was harmless. Given this, it strains credulity to suggest that Luo could have
 20 obtained a more favorable verdict if her counsel had sought further instruction
 21 regarding the prosecution’s most compelling theory of her guilt. Consequently,
 22 Luo cannot show that any supposed ineffective assistance was prejudicial, and is
 23 therefore not entitled to relief.

24 Luo’s argument regarding the representation of appellate counsel is similarly
 25 unavailing. (*See* ECF Doc. 60 at 3.) After reviewing the record, Luo’s appellate
 26 counsel identified no meritorious issue to raise on appeal, and followed the standard
 27 California procedures established in *People v. Wende*. (ECF Doc. 3 at 3-4; ECF
 28 Doc. 33 at 102; Lodgment 2 at 5-6.) As noted in Respondent’s Memorandum,

1 California's *Wende* procedures provide the safeguards necessary to constitute
2 adequate and effective appellate review, and Luo must prove that counsel's choice
3 to file a *Wende* brief was objectively deficient and prejudicial. *Smith v. Robbins*,
4 528 U.S. 259, 276, 278-279, 284-286 (2000). Here, defense counsel's decision to
5 refrain from challenging the given instructions was not without conceivable tactical
6 purpose, and Luo's conviction for violating a court order was a foregone conclusion
7 in light of overwhelming and undisputed evidence that she disobeyed her obligation
8 to take down the photos she had posted online. Accordingly, appellate counsel did
9 not render deficient representation or prejudice Luo by declining to pursue a futile
10 argument. *See Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017)
11 ("Effective appellate counsel should not raise every nonfrivolous
12 argument on appeal," but instead is only required to present arguments "most likely
13 to succeed."). For the same reasons, Luo's accusation of ineffective assistance
14 cannot excuse her procedural default of this claim. *Id.* at 2064-2065 (claim of
15 attorney error that does not violate the Constitution is attributed to the prisoner.).

16 CONCLUSION

17 This Court should dismiss the Amended Petition with prejudice and deny a
18 certificate of appealability.

19 Dated: May 23, 2024

20 Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: **Luo v. The People of the State of California** No. **8:22-cv-01640-MEMF-KES**

I hereby certify that on May 23, 2024, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

SUPPLEMENTAL RESPONSE TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On May 23, 2024, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Xingfei Luo
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In Pro Per

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 22, 2024, at San Diego, California.

R. Pencheff
Declarant


Signature